Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

Quincy Mall, Inc., Petitioner
v.
Parisian, Inc., Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

KAREN L. KENDALL
CRAIG L. UNRATH
Counsel of Record
HEYL, ROYSTER, VOELKER & ALLEN
Bank One Building, Suite 600
124 S.W. Adams Street
Peoria, IL 61602
(309) 676-0400

DAN BINAU
RALPH E. DILL
HARRIS, McCLELLAN, BINAU & COX
37 W. Broad St., Suite 950
Columbus, OH 43215-4132
(614) 464-2572

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

54pp

QUESTION PRESENTED FOR REVIEW

Where A Bankruptcy Court Improperly Asserts Jurisdiction Over A Post-Confirmation Claim, And Where The Elements Of *Res Judicata* Have Not Otherwise Been Satisfied, Can The Bankruptcy Court's Ruling Be Afforded Preclusive Effect In Subsequent Litigation In Other Forums?

PARTIES TO PROCEEDING

Quincy Mall Inc., Plaintiff/Petitioner

Parisian, Inc., Defendant/Respondent

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the corporation's stock.

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JURISDICTIONAL STATEMENT

This is an appeal of a final judgment of the Seventh Circuit Court of Appeals entered on November 16, 2001. Petitioner filed a timely Petition for Rehearing on November 30, 2001, which the Court of Appeals denied on January 10, 2002. Jurisdiction in this Court lies under 28 U.S.C. §1254(1).

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STATEMENT OF THE CASE

Jurisdiction in the District Court

Plaintiff, Quincy Mall, Inc., filed this action in the Circuit Court of the Eighth Judicial Circuit of Illinois on February 7, 2000. On March 2, 2000, Defendant Parisian, Inc. removed the action to the United States District Court for the Central District of Illinois. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §1332(a) in that the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. Quincy Mall, Inc.. is an Ohio corporation with its principal place of business in Quincy, Illinois. Parisian, Inc. is an Alabama corporation with its principal place of business in Birmingham, Alabama.

On October 30, 2000, the District Court entered a final order granting Parisian's Motion to Dismiss. Quincy Mall filed a timely Notice of Appeal on November 28, 2000. Jurisdiction vested in the Court of Appeals, Seventh Circuit, under 28 U.S.C. §1291.

Statement of Facts

Parisian, Inc. (Parisian) entered into a property lease with Quincy Mall, Inc. (Quincy) intending to build a retail department store on the property. Parisian financed the project through industrial revenue bonds which were secured by Quincy through a mortgage of its fee interest in the leased property. If Parisian failed to make payments on the bonds, Quincy's fee interest in the leased property would be subject to foreclosure.

On August 23, 1991, Parisian (then known as P. A. Bergner & Co.) filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code.[1] In March, 1992, Quincy filed a proof of claim in bankruptcy court based on an implied contract to indemnify Quincy in the event that Parisian failed to make payments on the bonds secured by property.

Eight months later, on November 9, 1992, Quincy and Parisian entered into a Letter Agreement modifying their business relationship. The Letter Agreement provided, among other things, that in the event of foreclosure on the property due to Parisian's failure to make payments on the bonds, Parisian would pay to Quincy an amount equal to its rent payments as though the foreclosure had never occurred. Approximately one month later, the bond indenture trustee initiated a foreclosure action on the property.

On October 15, 1993, the bankruptcy court entered an order confirming Parisian's Fourth Amended Joint Plan of Reorganization and, in 1994, the Receiver began to collect rents payable by Parisian to Quincy under its lease. Then, on May 17, 1995, over a year and a half after confirmation of the bankruptcy estate, Quincy issued a written demand upon Parisian for compensation under the terms of the Letter Agreement, but Parisian refused to pay.

On December 22, 1999, Quincy filed an amendment to its claim in bankruptcy in order to state a liquidated amount in a previously unliquidated claim. The amendment explicitly stated that its post-confirmation

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[1] For purposes of clarity, all references to the Defendant/Respondent are made in the name of its current, successor corporation, Parisian, Inc.

claim under the Letter Agreement was "separate and apart" from its claim in bankruptcy and was specifically excluded from that claim. Parisian objected to the bankruptcy claim without any reference to the Letter Agreement and without stating any defenses that may have been applicable to the Letter Agreement.

On February 7, 2000, Quincy filed the complaint at issue in this case in the Illinois circuit court alleging a claim against Parisian for breach of the Letter Agreement. Quincy then sought to withdraw its claim in bankruptcy. Two hearings were held on the motion to voluntarily withdraw its bankruptcy claim. At both hearings, Quincy specifically maintained that its proof of claim in the bankruptcy proceeding was entirely different and separate from its claim based on the Letter Agreement.

Despite the fact that the claim under the Letter Agreement was a post-confirmation claim, the bankruptcy court purposely sought to extinguish it in its order granting the withdrawal of the claim in bankruptcy, ruling that the motion was allowed "with prejudice and on the merits." The court ordered that "all damages, sums, and rights, regardless of the theory of recovery, whether valued, unvalued, liquidated, contingent or non-contingent, which were requested in, referenced in, and/or related to" the bankruptcy claim were denied with prejudice and on the merits. The order granting the motion to withdraw contained no specific reference to the Letter Agreement claim.

After removing the state court claim to the federal district court, Parisian filed a motion to dismiss arguing that the dismissal with prejudice in bankruptcy court was *res judicata* to the claim now pending before the district court. The district court disagreed, holding that the doctrine of *res judicata* did not apply. Nevertheless, the

district court ruled, *sua sponte* that the action was barred on the basis of issue preclusion, holding that the element of damages had been actually litigated in the bankruptcy proceedings.

Quincy appealed, arguing among other things, that the bankruptcy court had no jurisdiction over post-confirmation claims such as the Letter Agreement. Quincy further pointed out that the measure of damages under the Letter Agreement was completely different, and would require different proof, than the claim in bankruptcy. Accordingly, Quincy argued, there could be no identity of causes of action necessary for application of the doctrine of claim preclusion.

The Court of Appeals affirmed, holding that the bankruptcy court properly asserted its jurisdiction over post-confirmation claims. The court further concluded that, if Quincy was dissatisfied with the bankruptcy court's assertion over a claim outside its jurisdiction, it had no choice but to appeal directly from that decision. The Court of Appeals subsequently denied Quincy's petition for rehearing.

ARGUMENT

I. Where A Bankruptcy Court Improperly Asserts Jurisdiction Over A Post-Confirmation Claim, And Where The Elements Of Claim Preclusion Have Not Otherwise Been Satisfied, There Can Be No Preclusive Effect On Subsequent Litigation In Other Forums.

A. Introduction

This case presents a question important to the administration of justice in the federal system. All courts and tribunals in the federal system are of restricted jurisdiction, in that they have subject matter jurisdiction only of such proceedings as are expressly or impliedly consigned to them. Restatement (Second) of Judgments §11, Comment a (1982). This is a consequence of the legal structure of American federalism, in which the authority of the Federal Government is itself restricted to matters delegated to it by the Constitution. *Id.*

In this case, the Court of Appeals, Seventh Circuit, has implicitly ruled that a decision of a court of limited jurisdiction granting a motion to withdraw a claim in bankruptcy holds preclusive effect even as to matters that are clearly outside the bankruptcy court's jurisdiction. The decision of the Court of Appeals in this case stands in direct conflict with decisions of other circuits that have concluded that a judgment derived from a court without jurisdiction to deal with the merits of a claim cannot bar litigation of the claim in another forum. See Anderson v. Pinkett, 439 F.2d 619, 620 (D.C. 1971). In addition, the court's ruling blurs the line delineating the contours of bankruptcy court jurisdiction and the preclusive effect of

judgments handed down by other courts of limited jurisdiction. As such, the decision of the Court of Appeals generates a sense of confusion in our federal courts as to the proper application of the doctrine of *res judicata* that demands this Court's attention. See Smith, Hinchman and Grylls v. Tasic, 990 F.2d 256 (6th Cir. 1993).

The salient facts in this case are easily summarized. Petitioner, Quincy Mall, Inc. (Quincy), had pending before the bankruptcy court a proof of claim explicitly stating that it did not include its post-confirmation claim under a Letter Agreement. At no time did the debtor, Parisian, Inc. (Parisian), dispute Quincy's assertion that the Letter Agreement claim was entirely separate from its proof of claim in bankruptcy. Nor did the bankruptcy court issue any ruling explicitly stating that it was asserting its jurisdiction over the post-confirmation claim. Rather, in granting Quincy's motion to withdraw its claim in bankruptcy, the court merely stated that it would only do so if the dismissal was with prejudice and on the merits. The fact remains, however, that the actual merits of the Letter Agreement claim were never brought before that court in any form or manner. Indeed, no evidence was heard by that court at all.

Nevertheless, the Court of Appeals held that the bankruptcy court's dismissal on the merits should be accorded preclusive effect as to the Letter Agreement claim, and that Quincy's failure to appeal directly from the bankruptcy court's order foreclosed its claim. That decision ignored the established principles of bankruptcy court jurisdiction as well as a number of fundamental principles underlying the doctrine of claim preclusion. The bankruptcy court was not empowered to issue any ruling on claims that arise post-confirmation. Accordingly, the bankruptcy court's ruling cannot be

accorded any preclusive effect. In addition, the substance of the Letter Agreement claim was never "actually litigated." As such, the doctrine of claim preclusion is inapplicable to the circumstances in this case.

B. The Bankruptcy Court Lacked Jurisdiction Over The Letter Agreement Claim

Like all other federal courts, the bankruptcy court is a court of limited jurisdiction and receives its jurisdictional mandate in a statutory grant of power. Celotex Corp. v. Edwards, 514 U.S. 300, 115 S.Ct. 1493, 1498, 131 L.Ed. 2d 403 (1995). Jurisdiction is initially conferred on the district courts in 28 U.S.C. §1334(b), which extends it to all civil proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C. §1334 (b). In turn, jurisdiction is conferred on the bankruptcy courts in 28 U.S.C. §157(a), which authorizes the district courts to refer all proceedings arising under title 11, or arising in or related to a case under title 11, to bankruptcy judges. 28 U.S.C. §157(a).

In addition to being limited in scope, bankruptcy jurisdiction is also limited in duration. In contrast to the district courts, which offer the parties complete relief, bankruptcy courts' purposes are more circumscribed. Bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose. In re Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987).

Under §157, a bankruptcy court has the power to hear and determine all "core proceedings" arising under title 11. A bankruptcy judge may hear non-core proceedings and make proposed findings of fact and conclusions of

law to the district court, but he may not enter a final order or judgment. A proceeding is core if it is a proceeding that, by its nature, could only arise in bankruptcy. Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990). The Seventh Circuit Court of Appeals has developed a similar test: A proceeding is core under Section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. Barnett v. Stern, 909 F.2d 973, 981 (7th Cir. 1990). Under either of these tests, it is readily apparent that the Letter Agreement cannot be a core claim. It does not invoke a substantive right under title 11. Rather, it is a simple contract case. As such, it could not arise "only in the context of a bankruptcy case."

Nor can it be said that the bankruptcy court had "related to" jurisdiction over the contract claim. The test for determining whether a civil proceeding is "related to" a bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Celotex Corp. v. Edwards, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed. 2d 403, 411 (1995). In this case, the bankruptcy reorganization plan was confirmed in October, 1993. Approximately one and a half years later, Parisian breached its contract under the Letter Agreement. The Letter Agreement, as a post-confirmation claim, had no relevance at all to the administration of the bankruptcy estate. The claim under the Letter Agreement, if successful, would be paid by a non-debtor party for the simple reason that the bankruptcy estate ceased to exist following confirmation of the plan. Accordingly, the Letter Agreement claim did not "arise under" the bankruptcy court case.

Nor can the claim under the Letter Agreement be said to have been "related to" the bankruptcy. A dispute is related to a bankruptcy only when the dispute "affects the amount of property available for distribution or the allocation of property among creditors." In re Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987). As this Court recently cautioned, a bankruptcy court's "related to" jurisdiction cannot be limitless. Celotex Corp. v. Edwards, 514 U.S. 300, 115 S.Ct. 1493, 1499, 131 L.Ed. 2d 403 (1995). After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus the bankruptcy court's jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan. In re Johns-Manville Corp., 7 F.3d 32, 34 (2nd Cir. 1993).

Where a bankruptcy court issues a ruling in a matter over which it lacks core jurisdiction, that ruling can have no preclusive effect on subsequent litigation in other forums. To the extent that the bankruptcy court attempted to assert its jurisdiction over the claim based on the Letter Agreement, that exercise of jurisdiction represents a blatant abuse of judicial discretion. The fact that the Court of Appeals is willing to afford preclusive effect to a ruling such as this will set a dangerous precedent that will necessarily undermine the administration of justice in our courts.

C. The Doctrine of *Res Judicata* Is Inapplicable Where There Is No Identity Of The Cause Of Action, And Where There Is No Final Judgment On The Merits.

Claim preclusion prohibits parties from relitigating issues that were decided in a prior lawsuit where there was (1) a judgment on the merits in an earlier action; (2) identity of parties; and (3) identity of the cause of action between both suits. Brzostowski v. Laidlaw Waste Systems, Inc., 49 F.3d 337, 338 (7th Cir. 1995). In this case, there was no judgment on the merits, nor was there an identity of the cause of action in both suits. Accordingly, the Court of Appeals misapplied the doctrine of claim preclusion to this case.

The Court of Appeals reasoned that the decision in the bankruptcy court constituted a judgment on the merits for the simple reason that the bankruptcy court's ruling granted Quincy Mall's motion for voluntary dismissal "with prejudice and on the merits." On the basis of this language, the court ruled that the dismissal of an action with prejudice constituted a final judgment on the merits. That ruling contradicts a recent decision of this Court, where it was held that:

> Over the years the meaning of the term 'judgment on the merits' 'has gradually undergone change,' and it has come to be applied to some judgments (such as the one here) that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim-preclusive effect. That is why the Restatement of Judgments has abandoned the use of the term — 'because of its possibly misleading connotations'; Restatement §19 comment a, at 161.
>
> In short, it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to

> claim preclusive effect; and there are a number of reasons for believing that the phrase 'adjudication upon the merits' does not bear that meaning in Rule 41(b). Semtek International Inc.v. Lockheed Martin Corp., 531 U.S.497, 502-03, 121 S.Ct. 1021, 149 L.Ed. 2d 32 (2001) (Emphasis in original; citations omitted).

In this case, the bankruptcy court heard no evidence and issued no ruling specific to Quincy Mall's claim under the Letter Agreement. Accordingly, the bankruptcy court could not possibly have ruled "on the merits" regarding any issue involving Parisian's breach of the Letter Agreement.

The Court of Appeals also erred in finding an identity in the causes of action between the claim in bankruptcy and the claim under the Letter Agreement. The Court of Appeals found it significant that the same damages were claimed in both actions. That is simply not true. The measure of damages in the bankruptcy claim is completely different than the claim under the Letter Agreement. If the mortgage had been foreclosed, the measure of damages would have been the loss of the fee interest in the real property. The damages would equal the value of the fee interest.

In contrast, the damages resulting from the breach of the Letter Agreement were contract damages – in this case, the loss of future rents. This would be determined by the discounted value of future rental income. In other words, the facts required to prove its case under the bankruptcy action would have been entirely different from the facts required to be proven in the action under the Letter Agreement. And, as explained above, the

bankruptcy court had no jurisdiction over the post-confirmation breach of the Letter Agreement in the first place.

D. A Tacit Assertion of Jurisdiction by a Bankruptcy Court Over a Post-Confirmation Claim That Has Never Been Adjudicated Has No Preclusive Effect on Subsequent Litigation.

It is a fundamental principle of the law of former adjudication that only valid and final judgments are afforded claim preclusive or issue preclusive effect. Taylor v. Tsaroff, 884 F.2d 478, 481 (9th Cir. 1989). One of the prerequisites for a "valid" judgment is that the rendering court have jurisdiction of the subject matter of the action. *Id.* Traditional black-letter law placed greater importance in confining courts within the scope of their jurisdictional mandate than in achieving repose in litigation. In a series of decisions, this Court has shifted the emphasis from jurisdictional sovereignty to judicial finality. See Durfee v. Duke, 375 U.S. 149, 11 L.Ed. 2d 186, 84 S.Ct. 242 (1963). Nevertheless, the determination of a court's power to determine its own jurisdiction, and the preclusive effect of that determination upon litigation in other courts remains a divisive issue in our courts.

As one court explained, the capacity of federal courts to determine their own jurisdiction derives in large part from the confidence Congress and the Constitution have reposed in Article III courts. A court whose jurisdiction is closely confined is one in which the legislature has reposed little confidence; if the legislature has little confidence in a court, it is less likely to have granted that

court jurisdiction to determine its own jurisdiction. Commodities Export Co. v. U.S. Customs Service, 957 F.2d 223, 226 (6th Cir. 1992). The Commodities Export decision resolved the issue of whether a court's jurisdictional determination should be deemed *res judicata* by reference to Section 12 of the Restatement (Second) of Judgments. The Restatement suggests that a jurisdictional determination should not be deemed conclusive if (1) the subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; (2) if to allow the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) the judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction.

In a subsequent decision, the same court employed an entirely different approach to the same problem. In Smith, Hincham and Grylls v. Tassic, 990 F.2d 256 (6th Cir. 1993), the court resolved the issue by reference to Section 451(2) of the Restatement of Conflict of Laws (Supp. 1948). That section provides that, where a court determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter unless the policy underlying the doctrine of *res judicata* is outweighed by the policy against permitting the court to act beyond its jurisdiction. The relevant factors appropriate for consideration in determining that collateral attack should be permitted are that:

(a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law rather than fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong.

The court noted that this test was approved in dicta by this Court in Durfee v. Duke. The two widely varying approaches utilized in the Smith and Commodities Export decisions contrast with the simple approach used in Anderson v. Pinkett, 439 F.2d 619 (D.C. Cir. 1971), where the court simply held that the jurisdictional determination was made in an "inappropriate forum." Accordingly, the court being without jurisdiction to deal with the merits in the earlier proceeding, its decision could "hardly bar" any subsequent litigation in a different forum. Anderson v. Pinkett, 439 F.2d 619, 620 (D.C. Cir. 1971).

These widely varying approaches utilized to resolve the issue of the preclusive effect of a court's erroneous assertion of jurisdiction indicate a serious division among the federal circuits that demands resolution by this Court. Petitioners submit that whatever test is employed, the bankruptcy court's attempt to assert jurisdiction over the post-confirmation claim in this case was entirely inappropriate and, under the circumstances, cannot be accorded any preclusive effect.

The comments to Section 12 of the Restatement explain that the principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy. Restatement (Second) of Judgments, §12 (1982), Comment a. The comments also note that "there is a practical difference between the issue of jurisdiction being actually adjudicated and its being only implicitly adjudicated." Restatement (Second) of Judgments §12, Comment d (1982). That comment accurately describes the circumstances presented in this case. The bankruptcy court did not, at any time, litigate the merits of the claim under the Letter Agreement, or any other dispute. Rather, the bankruptcy court merely granted a motion to withdraw the claim. It should also be noted that the bankruptcy court did not explicitly rule that it had jurisdiction over the Letter Agreement claim. Instead, the court merely granted the motion to withdraw the claim in bankruptcy with prejudice and on the merits.

The decision of the Seventh Circuit holding that Quincy was required to file a direct appeal of the bankruptcy court's decision effectively holds that a tacit, implied assertion of jurisdiction by a court of limited jurisdiction over a claim clearly outside its jurisdiction is *res judicata* as to any subsequent claim brought in another forum. This cannot be the law. As the comments to Section 12 of the Restatement attest, the interests primarily at stake in resolving this question are governmental and societal, not those of the parties. It is essential that this Court provide guidance to the lower courts by delineating a clear standard for determining whether a tacit assertion of jurisdiction issued by a court of limited jurisdiction in an order granting a motion to withdraw endows that order with preclusive effect on subsequent litigation.

CONCLUSION

WHEREFORE, Petitioner, QUINCY MALL, INC., respectfully requests that this Court grant its Petition for Certiorari or, in the alternative, exercise its supervisory authority and remand this case to the Court of Appeals with instructions to reverse the District Court's order granting the motion to dismiss.

Respectfully submitted,

By:_____

HEYL, ROYSTER, VOELKER & ALLEN
Craig L. Unrath
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 14, 2001
Decided November 16, 2001

Before

Hon. Joel M. Flaum, *Chief Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

No. 00-4144 Appeal from the United States District Court for the Central District of Illinois

No. 00 C 3059
Jeanne E. Scott, Judge

Quincy Mall, Inc., Plaintiff-Appellant,

v.

Parisian, Inc., Defendant-Appellee.

ORDER

Quincy Mall, Inc., an Ohio corporation, sued Parisian, Inc., an Illinois corporation, in Illinois state court seeking a declaratory judgment concerning its rights under a commercial lease and $600,000 in damages. After Parisian removed the case to federal court, it moved to dismiss the case under Fed. R. Civ. P. 12(b)(6), arguing that the action was barred by *res judicata*. The district court determined that *res judicata* did not apply, but that the case was barred by collateral estoppel, thus requiring

the dismissal of the lawsuit. Quincy Mall appeals, and because we conclude that *res judicata* does apply, we affirm.

I.

The facts in this case are convoluted. In a lease agreement dated May 16, 1977, Quincy Mall leased real property in the City of Quincy, Illinois to Parisian's predecessor, P.A. Bergner of Illinois, a retail department store.[1] On January 1, 1979, the City of Quincy issued industrial revenue bonds and, pursuant to a separate financing agreement, loaned the proceeds of those bonds to Parisian. This agreement provided financing for Parisian's construction of a retail department store on the real estate it had leased from Quincy Mall. To secure Parisian's obligations under the financing agreement, Quincy Mall and Parisian each granted the City of Quincy a first mortgage lien on t he construction project. The mortgage granted the City of Quincy security interest in all of Quincy Mall's interest in the Lease, a security interest in Parisian's leasehold estate under the Lease, a security interest in Quincy Mall's fee estate in the construction project, a security interest in all improvements to the project, as well as the proceeds resulting from the conversion of the project into any liquidated claims. In short, the City had a priority lien on the real estate, the leasehold interest, the rents receivable, and other related assets. The City then assigned all of its rights under the

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[1] Bergner became P.A. Bergner & Co. in October 1990. In October 1993, it became known as Carson, Pirie Scott & Co., by merger and name change. In January 1999, Carson became Parisian, Inc. by merger and name change. For convenience, we will refer to the entity as "Parisian" throughout this opinion.

mortgage to Bank One, Peoria, as Trustee pursuant to an Indenture of Trust dated January 1, 1979.

Twelve years later, on August 23, 1991, Parisian and various related corporations filed petitions for bankruptcy under Chapter 11 of the United States Bankruptcy Code. *See In re P.A. Bergner & Co. et al.*, No. 91-05501 to 91-05516-RAE-11 (Bankr. E.D. Wis.). At the time of filing, Parisian was current in its obligations to Quincy Mall under the Lease, and to Bank One under the industrial revenue bonds. However, on January 1, 1992, Parisian defaulted on the revenue bond note to Bank One. On March 19, 1992, Quincy Mall filed a proof of claim with the bankruptcy court seeking "to cover the future potential loss of its rents and/or fee simple title which are subject to the terms of the mortgage. . . ." Quincy Mall relied on its rights under the Lease, the mortgage, and the financing agreement as support for the proof of claim.

On November 9, 1992, during the course of the bankruptcy proceedings, Parisian and Quincy Mall entered into a Letter Agreement amending the Lease. This Letter Agreement provided that if Quincy Mall ceased to receive the minimum rent under the Lease, as a result of any foreclosure or conveyance in lieu of foreclosure "in connection with any mortgage or other financing obtained by" Parisian, the Parisian would nonetheless continue making such payments directly to Quincy Mall. Shortly thereafter, on December 11, 1992, Bank One initiated an action to foreclose on the mortgage against Quincy Mall's fee interest in the real property. After the filing of the foreclosure, Bank One requested and obtained the appointment of a receiver to receive rents payable by Parisian to Quincy Mall under the Lease.

In 1994, the receiver began to receive from Parisian the rents otherwise due to Quincy Mall. On May 17, 1995,

Quincy Mall made a written demand pursuant to the Letter Agreement that Parisian pay it the equivalent of the lost rents now being paid to Bank One. Parisian refused, questioning the effectiveness of the Letter Agreement. Thereafter, Quincy Mall entered into a settlement with Bank One to prevent a foreclosure sale of the real property, and to return the stream of rent payments from the receiver to Quincy Mall. Under the settlement agreement,[2] Quincy Mall paid Bank One $600,000 and granted it other rights in the leased premises, valued at $123,444.

Meanwhile, in bankruptcy court, Parisian and Quincy Mall continued their dispute. On July 16, 1993, Parisian objected to Quincy Mall's proof of claim. Parisian's bankruptcy plan was confirmed on October 23, 1993, and the Lease, now amended by the Letter Agreement with Quincy Mall, was assumed under the plan.[3] A certificate of resolution [4] was filed with the bankruptcy court on December 13, 1994 and included all of Quincy Mall's claims. Accordingly, upon submission of the certificate of resolution to the bankruptcy court,

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[2] This settlement agreement was not included in the record on appeal.

[3] According to the Bankruptc Code, the bankruptcy trustee or debtor in possession may assume or reject any executory contract or unexpired lease of the debtor. *See* 11 U.S.C. §§ 365(a), 1123(b)(2).

[4] The final plan of reorganization and certificate of resolution were not included in the record on appeal, but the reinstated objection Parisian filed with the bankruptcy court recites the relevant portions of these documents. Quincy Mall did not object to Parisian's description and we therefore accept these descriptions as accurate for purposes of this appeal.

Parisian withdrew its objection to Quincy Mall's claim, apparently believing that the dispute had been resolved by the confirmation of its plan of reorganization. It appears, although it is not clear from the record, that this dispute was resolved because Quincy Mall continued to receive rents from Parisian through the confirmation of the plan. The certificate of resolution permitted Parisian to reinstate its objections if the holder of a disputed claim sought payment or asserted rights post-confirmation. When Quincy Mall subsequently asserted a claim against Parisian for the amount it had paid to Bank One, Parisian reinstated its objection pursuant to the certificate of resolution.

Thus, on May 24, 1999, Parisian reinstated its objection to Quincy Mall's claim, arguing that any relief sought by Quincy Mall was subordinate to the unsecured claims of Bank One.[5] On June 11, 1999, Quincy Mall filed a response, in which it referred to Parisian's obligations under the Lease and Letter Agreement stating that the "effectiveness of that letter agreement is now in dispute." Quincy Mall argued in its response that Parisian withdrew its objection and therefore it could not be reinstated. Quincy Mall did not address Parisian's claim that Quincy Mall was seeking relief that had already been resolved in the confirmation of the plan, or was subordinate to Bank One's unsecured (and unpaid) claim. On December 22, 1999, pursuant to an order of the bankruptcy court, Quincy Mall filed an amended claim setting the amount of

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[5] In its objection to Quincy Mall's claim, Parisian stated that, pursuant to its 1996 settlement agreement with Bank One (which is not in the record on appeal), Parisian agreed that Bank One had an allowed unsecured claim of $1,573,444. Parisian further stated that it only paid $850,000 on this unsecured claim, leaving a balance of $723,444 (the total value given by Quincy Mall to Bank One.)

its claimed damages at $723,444 (which specifically included the $600,000 cash payment and the value of the rights it gave to Bank One). The amended claim alleged that Quincy Mall was seeking relief "for damages which might result from any action by Bank One to realize upon the mortgage upon Quincy Mall's real property." Quincy Mall no longer referred to the "lost rents" it had requested in its original proof of claim. Additionally, the amended proof of claim contained a "Statement to Clarify Claims before this Court" in which Quincy Mall asserted that it had suffered "separate and additional post-confirmation damages" arising from Parisian's breach of the Letter Agreement, and that these claims were excluded from those currently pending before the bankruptcy court. Parisian objected to Quincy Mall's amended claim and, on February 16, 2000, the bankruptcy court set the matter for trial during the week of May 15, 2000.

On February 7, 2000, unbeknownst to the bankruptcy court and during the pendency of the bankruptcy action, Quincy Mall filed a complaint for declaratory judgment against Parisian in Illinois state court, alleging anticipatory repudiation of the Letter Agreement and that Parisian refused to "compensate Quincy Mall for its lost rent and continues to refuse to compensate Quincy Mall for its losses occasioned by the foreclosure action of Bank One as Trustee." In its complaint, Quincy Mall sought a declaratory finding that Parisian is obligated to repay Quincy Mall "the $600,000 previously paid to Bank One." Then, on March 2, 2000, Quincy Mall sought to withdraw its pending amended proof of claim (eight years after its original proof of claim was filed) from the

bankruptcy court.[6] Parisian objected, and, after briefing and oral argument, the bankruptcy court dismissed Quincy Mall's proof of claim with prejudice, holding:

> the objection of Parisian to each of the four claims as amended . . . is sustained as though there had been a full adjudication, regardless of the theory of recovery, of each and every fact and issue, as well as the law, included in, referenced in, and/or related to each of the four claims as amended. . . . All damages, sums, and rights, . . . which were requested . . . are denied with prejudice and on the merits. This shall include, without limitation of any kind, the (a) $600,000 cash payment to Bank One by Quincy Mall; plus (b) Loss of specific rights in its fee valued to be at least $123,444.[7]

Meanwhile, back in state court, Parisian filed a notice of removal of Quincy Mall's complaint to federal court based on diversity jurisdiction. After successfully removing the action to federal court, Parisian filed a motion to dismiss the lawsuit, arguing that Quincy Mall's

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[6] Quincy Mall's motion to withdraw was not included in the record on appeal.

[7] The bankruptcy court also soundly criticized Quincy Mall for forum shopping, stating, "[w]hen [Quincy Mall] decided that things may not be going completely its way on its remaining claims, shortly before the trial pertaining to the claims it decided to take its cookies and seek another picnic ground and try a state court forum in its back yard."

claims were barred by the doctrine of *res judicata*. The district court rejected Parisian's *res judicata* argument, concluding that Quincy Mall's state law claim was separate from its bankruptcy claim because that claim was based on Parisian's breach of the mortgage, whereas the federal district court action was based on an alleged breach of the Lease as modified by the Letter Agreement. Instead, the court concluded that because Quincy Mall was seeking the same damages in both actions, the bankruptcy court's order precluded it from attempting to prove damages in the federal case based on the doctrine of collateral estoppel. Accordingly, the district court dismissed the case. Quincy Mall appeals.

II.

We review a district court's motion to dismiss under Rule 12(b)(6) *de novo*. *See Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001). The district court concluded that collateral estoppel, also known as issue preclusion, barred Quincy Mall's breach of contract claim against Parisian. However, on appeal, Parisian urges us to affirm the district court on the basis of *res judicata*. We may affirm a district court based on any reason adequately supported by the record. *See Andersen v. Chrysler Corp.*, 99 F.3d 846, 855 n.5 (7th Ci. 1996). In reviewing a motion to dismiss, we may look to matters of public record outside the pleadings, including the public court documents filed in the bankruptcy proceedings. *See Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994). Because we conclude that Quincy Mall's claim is barred by *res judicata*, we begin and end our analysis with this finding.

Res judicata, also known as claim preclusion, prohibits parties from relitigating issues that were decided

in a prior lawsuit, as well as any issues that *could have been* raised in the previous lawsuit. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* bars a claim where that was a: "(1) judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action between both suits." *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 338 (7th Cir. 1995). *See also Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 121 F.3d 1027, 1034 (7th Cir. 1997).

We quickly resolve the first two requirements of this test. First, the parties to the complaint, Quincy Mall and Parisian, are the same parties involved in the disputed claim in bankruptcy court, and thus are identical for purposes of *res judicata*. Second, the bankruptcy court's order was a judgment on the merits because it dismissed Quincy Mall's claim "with prejudice and on the merits . . . as though there had been a full adjudication." A dismissal of an action with prejudice constitutes a final judgment on the merits barring a later suit on the same cause of action. *See Phillips v. Shannon*, 445 F.2d 460, 462 (7th Cir. 1971).

Quincy Mall argues that because it voluntarily withdraw its amended proof of claim from the bankruptcy court, the bankruptcy court's order was akin to a consent judgment and thus did not constitute a "judgment on the merits." It is generally true, for purposes of applying collateral estoppel, that a consent judgment does not bar subsequent litigation of an issue unless the parties have expressed an intent to foreclose such action. *See Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir. 1987). This same principle, however, is not true in the *res judicata* context. For purposes of *res judicata*, a consent judgment does bar further litigation of the claim presented because it constitutes a "judgment on the merits." *See Arizona v.*

California, 530 U.S. 392, 414 (2000) (noting that "consent agreements ordinarily are intended to preclude any further litigation on the *claim* presented but are not intended to preclude further litigation on any of the *issues* presented.") (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443, pp. 384-85 (1981) (emphases added)). Thus, even assuming that the bankruptcy court order was in fact a consent judgment[8], it constituted a judgment on the merits for purposes of *res judicata*.

We are therefore left to consider the third requirement of *res judicata* – the identity of the claims. Claims have identity for *res judicata* purposes if the second claim "emerges from the same 'core of operative facts' as [the] earlier action." *Brzostowski*, 49 F.3d at 339 (citation omitted). In other words, a claim is deemed to be identical to a previously litigated claim if the two claims are "based on the same, or nearly the same, factual allegations arising from the same transaction or occurrence. *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Roboserve*, 121 F.3d at 1034. Thus, "once a transaction has caused injury,

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[8] A consent judgment normally describes a judgment, "the provisions and terms of which are settled and agreed to by the parties to the action." Black's Law Dictionary 842 (6th ed. 1990). Here, there was no such voluntary agreement. Rather, Parisian vigorously objected to Quincy Mall's motion to withdraw the claim, likely suspecting that it was forum shopping. (At oral argument Quincy Mall's attorney candidly acknowledged that he was forum-shopping in order to get the best result for his client.) In ruling on the contested motion to withdraw, the bankruptcy court only agreed to allow Quincy Mall to withdraw its claim if the order also treated the claim as though it had been fully adjudicated on the merits. To the extent that Quincy Mall continued to voluntarily seek withdrawal given the conditions imposed by the bankruptcy court, it arguably constituted a consent judgment.

all claims arising from that transaction must be brought in one suit or be lost." *Andersen v. Chrysler Corp.*, 99 F.3d 846, 852 (7th Cir. 1996) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986)). However, "[t]raditional principles of preclusion allow additional litigation is some new wrong occurs." *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1326 (7th Cir. 1992). Likewise, a party may assert a claim that "could not have been presented in the first case. . . ." *Id.*

Quincy Mall contends that these principles demonstrate that its state law breach of contract claim is distinct from the claim it had asserted before the bankruptcy court. According to Quincy Mall, the proof of claim it filed, and subsequently amended, in the bankruptcy court was based on Parisian's implied promise (under the mortgage) to indemnify Quincy Mall in the event that Parisian defaulted on its revenue bond payment, whereas its current lawsuit is based on Parisian's separate and later breach of contract under the Letter Agreement. Thus, Quincy argues that there are two separate and distinct causes of action and *res judicata* should not apply to bar its current claim. We disagree.

Quincy Mall's proof of claim in the bankruptcy court and its state law breach of contract claim are both based on the same core of operative facts, namely that Quincy Mall suffered damages when Parisian defaulted on the revenue bond note, causing Bank One to file a foreclosure action in which Quincy Mall lost its rents and had to pay damages to Bank One. Quincy Mall's own characterization of the events giving rise to each of its claims demonstrates that these same facts control and that it was continually seeking to be paid for the very same injury. At the time Quincy Mall filed its original proof of

claim, Parisian had defaulted on the note to Bank One. Thus, in that original proof of claim, Quincy Mall sought to cover its "future potential lost rents," foreseeing that those rents were in jeopardy, and specifically referring to the Lease to establish its right to such damages. Likewise, in that proof of claim, Quincy Mall specifically referred to the financing agreement and to the mortgage securing the revenue bonds (noting that its fee interest was at stake). In its amended proof of claim, filed after the Letter Agreement had been "breached," Quincy Mall again referred to the Lease (now modified by the Letter Agreement, though not specifically referenced), the mortgage, the financing agreement and Parisian's default to Bank One. Quincy Mall characterized its amended proof of claim as one for "damages which might resulted from any action by Bank One to realize upon the mortgage upon Quincy Mall's real property." Quincy Mall no longer referred to "lost rents" (perhaps in contemplation of its "separate" action), but such lost rents (whether due to Quincy Mall under the original Lease or under the Letter Agreement) are clearly "damages" resulting from Bank One's foreclosure action. Bank One's foreclosure action triggered the re-direction of those rents to a receiver. Finally, in its federal district court complaint, Quincy Mall again recited these same factual circumstances, complaining once again that Parisian refused to compensate it for lost rent and for losses caused by Bank One's foreclosure action. The damages sought were specifically the "$600,000 previously paid to Bank One."[9]

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[9] The interrelatedness of these claims is further evidenced by the underlying documents upon which Quincy Mall relies. The Letter Agreement itself specifically refers to the mortgage by requiring payment of rents lost "as a result of a foreclosure or conveyance in lieu

Quincy Mall argues that since each claim (indemnity under the mortgage or breach of contract) requires proof of different rights, duties and legal elements, that the claims are distinct. However, the test for identity of claims does not required "identity of legal theory or of facts . . ." *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999). While the "legal elements of each claim may be different, [if] the central factual issues are identical," *Brzostowski*, 49 F.3d at 339, the claim is barred by *res judicata*. As noted, in both cases, Quincy Mall's claim is triggered by Parisian's default to Bank One: Bank One foreclosed on Quincy Mall's real property interest, and Quincy Mall had to pay damages to avoid a foreclosure. Whether that claim is characterized as an indemnification under the mortgage or a breach of the Letter Agreement, the transaction giving rise to Quincy Mall's injury is the same. Accordingly, we have no difficulty determining that these separate claims arise out of the same core of operative facts, that the central factual issues are identical, and that Quincy Mall's state law breach of contract claim is barred by *res judicata*.

Quincy Mall's contention that its present lawsuit is based on new, post-confirmation breach of the Letter Agreement is unpersuasive. Quincy Mall argues that Parisian's refusal in 1995 to pay lost rent under the Letter Agreement (after the bankruptcy plan had been confirmed) constituted a new injury. However, as noted *res judicata* mandates that "once a transaction has caused injury, all claims arising from that transaction must be

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of foreclosure in all or any part of Quincy Mall's title to the Bergner's site *in connection with any mortgage or other financing obtained by Bergner's* . . ." Likewise the mortgage, wherein Quincy Mall voluntarily placed its rights under the Lease in jeopardy, refers to the underlying Lease.

brought in one suit or be lost." *Andersen*, 99 F.3d at 852. That is true regardless of the theory of recovery or the reliance on different documents to support the claim. In this case, the underlying transaction causing the injury was the same – Quincy Mall was damaged by Parisian's default on the revenue bond note to Bank One, because Bank One could then go after Quincy Mall's rights under the mortgage and receive the rents payable under the Lease. Quincy Mall's suit on the Letter Agreement was simply a different vehicle to be paid for the same wrong. Accordingly, we conclude that Quincy Mall's present claim fails to allege any new injury, and that its reliance on the Letter Agreement is akin to an alternative theory of recovery rather than a truly separate cause of action.

Moreover, Quincy Mall's characterization of its claim as a "post-confirmation" breach completely overlooks a significant point: all of the essential conduct complained of (including Parisian's refusal to pay lost rents under the Letter Agreement) occurred *before* the bankruptcy court issued its final order dismissing all of Quincy Mall's claims with prejudice on March 17, 2000. In its response to Parisian's reinstated objection, Quincy Mall actually raised Parisian's refusal to pay under the Letter Agreement by stating that "the effectiveness of that letter agreement is now in dispute." In addition, in its amended proof of claim, Quincy Mall also attempted to reserve or set aside any claims relating to the Letter Agreement, claiming that the bankruptcy court had no jurisdiction over the merits of such claims. Thus, these issues were already before the bankruptcy court and, while they were not *technically* litigated, were disputed by Parisian and ultimately resolved by the bankruptcy court's order (with Quincy Mall's implicit agreement) dismissing the claim "as though there had been a full adjudication."

Quincy Mall's bold assertion that the bankruptcy court lacked the jurisdiction to enter an order disposing of its claim under the Letter Agreement and that therefore the claim remains viable has no foundation. The bankruptcy court has jurisdiction to consider whether something is properly part of the bankruptcy estate. In its final order, the bankruptcy court specifically dismissed with prejudice all of Quincy Mall's claims "regardless of the theory of recovery" and ruled against Quincy Mall on every issue of law and fact. Implicit in this ruling was a determination that, regardless of Quincy Mall's claim to the contrary, the bankruptcy court had jurisdiction to consider the merits of all of Quincy Mall's claims, including any asserted under the Letter Agreement, and that those claims were without merit. Even if the court's judgment was wrong, it still would have *res judicata* effect. *See Federated Dep't Stores, Inc.*, 452 U.S. at 398 ("the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong . . ."). If a party receives an adverse judgment (as Quincy Mall did here), it must appeal that decision. This is what Quincy Mall should have done. Quincy Mall could have stayed in bankruptcy court through trial, with the bankruptcy exercising jurisdiction over the claim (a decision Quincy Mall could have appealed), or the court might have declined to exercise jurisdiction, concluding that the claim was truly separate (in which case Quincy Mall would certainly have had a better argument in federal district court). Quincy Mall did neither, and it is therefore precluded, pursuant to the doctrine of *res judicata*, from

filing a second action to circumvent the undesirable results of the bankruptcy court's order.[10]

III.

In conclusion, Quincy Mall's state law breach of contract claim involved the same core of operative facts as those set forth in the proof of claim it filed with the bankruptcy court. Quincy Mall obtained an eleventh hour voluntary dismissal from bankruptcy court on the eve of trial to avoid an adverse judgment by the bankruptcy court. It then filed the underlying civil action in an attempt to do an end-run around the bankruptcy court's order. This blatant forum shopping, admitted to at oral argument by Quincy Mall's counsel, will not be condoned, nor will such disrespect of bankruptcy proceedings be tolerated under the principles of *res judicata*. Accordingly, we affirm the judgment of the district court on these separate grounds.

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[10] We also note the enormous expense of judicial time and resources in bankruptcy court throughout this prolonged case. Quincy Mall's first proof of claim was filed in March 1992. Over seven years later, when Quincy Mall filed its amended proof of claim, the parties were still carrying on their dispute in bankruptcy court. Yet, it was not until the following year, with trial a mere two months away, that Quincy Mall sought leave to withdraw. Additionally, Parisian's alleged breach of the letter agreement occurred in 1995. However, Quincy Mall stayed in bankruptcy court for five more years before suddenly deciding to put its eggs in another basket by filing the present action in federal district court. Concern for the waste and misuse of precious judicial resources are at the heart of preclusion principles.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 10, 2002

Before

Hon. Joel M. Flaum, *Chief Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

No. 00-4144 Appeal from the United States District Court for the Central District of Illinois

No. 00 C 3059
Jeanne E. Scott, Judge

Quincy Mall, Inc., Plaintiff-Appellant,
v.
Parisian, Inc., Defendant-Appellee.

ORDER

Plaintiff-Appellant filed a petition for rehearing on November 30, 2001. All of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.

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UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF ILLINOIS
SPRINGFIELD DIVISION

QUINCY MALL, INC.
Plaintiff,
v.
PARISIAN, INC.,
Defendant.

FILED
OCT 30 2000
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

ORDER

JEANNE E. SCOTT, U.S. District Judge:

This cause is before the Court on Defendant Parisian, Inc.'s (Parisian) Motion To Dismiss. Quincy Mall, Inc. (Quincy) sought to recover the same damages in both a bankruptcy proceeding and in this action. The Bankruptcy Court ruled adversely to Quincy on all issues. Parisian argues that Quincy's claim in this Court is barred by res judicata. Quincy argues that res judicata is not applicable here so that its claim may go forward. Quincy raises a separate claim in this Court from its claim in the bankruptcy proceeding; thus, res judicata is not a bar. However, the Bankruptcy Court ruled adversely to Quincy on all issues, including whether it had suffered any damage. Quincy is thus barred in this action by collateral estoppel from asserting an essential element of its claim, being damages. Parisian's Motion to Dismiss therefore will be ALLOWED.

For purposes of this motion, the Court must accept as true all well-pleaded factual allegations contained in the Complaint and draw all inferences in the light most favorable to the non-moving party. *Hager v. City of West*

Peoria, 84 F.3d 865, 868-69 (7th Cir. 1996); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 178 (7th Cir. 1996). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996). In ruling on this motion, the Court may consider documents contained in the court file of the bankruptcy proceedings. *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994).

FACTS

Quincy leased real property to Parisian's predecessor, Bergner of Illinois (Bergner), pursuant to a Lease dated May 16, 1977. On January 1, 1979, the City of Quincy, Illinois (City) issued industrial development revenue bonds and loaned the proceeds to Bergner to finance construction of a shopping mall on space leased from Quincy. To secure Bergner's obligations, Quincy and Bergner granted the City a mortgage lien and a security interest in Quincy's right, title and interest in the property, including leases, subleases, and rents. The mortgage obligated Bergner to make payments to the Bond Trustee and for Quincy to make the payments if Bergner defaulted. The City assigned its rights under the mortgage to Bank

One, Peoria (Bank One).[1] Bank One became indenture trustee for the bonds.

On August 23, 1991, Bergner filed for Chapter 11 bankruptcy protection. In January of 1992, Bergner defaulted on the payment due on the industrial revenue bonds, putting Quincy's fee interest in the leased property at risk. On March 19, 1992, Quincy filed a proof of claim with the Bankruptcy Court for loss resulting from any liability it would incur to Bank One as a result of Parisian's breach of the mortgage.[2] Quincy's claim arose during the pendency of Bergner's bankruptcy and so it was subject to the bankruptcy reorganization. *See* 11 U.S.C. §§ 501(d); 502(e)(2).

On November 9, 1992, Bergner and Quincy entered into a letter agreement which amended the 1977 lease.[3]

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[1] The mortgage provides that the Mortgagor (Bergner) and Landlord (Quincy) "have executed and delivered this Mortgage and by these presents do each hereby grant, bargain, sell, alien, enfeoff, release, pledge, mortgage, warrant and confirm to the Mortgagee [City of Quincy], and do hereby grant a security interest to the Mortgagee in, all of the Mortgagor's and Landlord's estate, right, title and interest in, to and under any and all of the following described property . . . whether now owned or held or hereafter acquired." The mortgage also provided that filing bankruptcy is a default under the mortgage and it authorized Bank One to collect rents in the event of a default.

[2] The original proof of claim stated that it was to "cover the future potential loss of its [Quincy's] rents and/or fee simple title which are subject to the terms of the mortgage . . . ."

[3] The agreement provided that "Tenant shall petition the Court in the Case to permit Tenant to assume the Lease and the Operating Agreement in their existing forms except only for the amendments and/or agreements outlined in this

The agreement provided, among other things, that if Bergner failed to pay Quincy minimum rent and/or percentage rent payments as a result of a foreclosure, Bergner would pay Quincy an amount equal to the minimum rent and percentage rent it would otherwise owe.[4]

On December 11, 1992, Bank One foreclosed on the mortgage in the Circuit Court of Adams County, Illinois. At Bank One's request, the court appointed a receiver who took possession of Quincy's fee interest in the property. While this was proceeding, the Bankruptcy Court entered its Confirmation Order on Bergner's Fourth Amended Joint Plan of Reorganization in October, 1993. The Confirmation Order indicated that the Bankruptcy Court retained jurisdiction to resolve disputed claims. *See* 11 U.S.C. §§ 1141(b); 1141(c).

In 1994, the receiver began to receive rents from Bergner that were formerly payable to Quincy. On May 17, 1995, Quincy demanded that Bergner pay it for lost rents in accordance with the letter agreement.[5] Bergner refused

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proposal . . . ."

[4] The parties agreed to modify the lease by the terms of the letter agreement pursuant to 11 U.S.C. §§ 365(b)(1)(C).

[5] The agreement provided that "if Quincy at any time ceases to receive the minimum rent and/or percentage rent payments required by the Lease as the result of a foreclosure or conveyance in lieu of foreclosure of all or any part of Quincy's title to the Bergner's site in connection with any mortgage or other financing obtained by Bergner's or any judgment rendered against Bergner's to which financing or judgment Quincy's ownership of the Bergner's site is

and questioned the effectiveness of the letter agreement. Quincy wrote a letter on May 26, 1995, again requesting Bergner to acknowledge the effectiveness of the letter agreement, which Bergner refused to do. As a result of Bergner's alleged anticipatory repudiation of the letter agreement, Quincy entered into a settlement with Bank One, the Chapter 11 Trustee, to prevent a foreclosure. Under the settlement, Quincy paid Bank One $ 600,000 and gave up other valuable rights. During this period, Bergner merged with and became known as Carson, Pirie Scott & Co., and then Parisian.

In December 1999, Quincy filed an amended claim to which Parisian objected. The amended claim was to set the amount of Quincy's liquidated damages arising from the mortgage default as directed by the Bankruptcy Court in its order of October 6, 1999. The United States Bankruptcy Court for the Eastern District of Wisconsin set the objection to the claim for trial during the week of May 15, 2000. On February 7, 2000, however, Quincy filed a Complaint For Declaratory Judgment against Parisian in the Circuit Court of the Eighth Judicial Circuit in Adams County, Illinois. In its Complaint, Quincy alleges that Parisian's conduct constituted an anticipatory repudiation of the letter agreement. Quincy seeks to hold Parisian liable for the same $600,000 in damages it suffered by settling with Bank One. Quincy's Complaint requests that

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subordinate or subject, then in addition to the payments required by the first paragraph of this Section 6.5, Bergner's shall pay to Quincy as an additional contribution to Quincy toward the costs of repairs, utilities, taxes, insurance and maintenance of the Mall an additional sum equal to the minimum rent and percentage rent payments which would have been received by Quincy pursuant to the Lease if such foreclosure or conveyance had not occurred."

the parties' rights and liabilities be declared, that Parisian be found to have breached its lease, and that Parisian be found to have anticipatorily breached the letter agreement.

Before this filing, Quincy filed a Motion to Withdraw its Claim in the Bankruptcy Court to which Parisian objected. Parisian disputed that it was liable for the alleged damages. Parisian specifically stated that it paid all sums due and owing under the letter agreement. Quincy responded by stating Parisian would not be prejudiced by the withdrawal of Quincy's claims with prejudice since Parisian would get the same result as if the claim had been litigated. It said, "if the debtor was successful at trial, the result would be no distribution to Quincy Mall, the same effect as allowing withdrawal." Tr. of Bankruptcy Court Proceedings, Mar. 17, 2000, at 24, quoted by the Bankruptcy Judge on the record. The Bankruptcy Court stated that, "to this court that statement means at a minimum that the withdrawal of the claims on their merits has the same legal effect as [Quincy] trying all triable issues pertaining to the claims and losing on each and every issue. The court is so ruling at this time." *Id.* The Bankruptcy Court then dismissed Quincy's claims with prejudice and on the merits on March 17, 2000.

Parisian removed Quincy's Complaint to this Court and now argues that Quincy's claim is barred by res judicata. Parisian contends that Quincy's Complaint is identical to its claim filed in the bankruptcy action that was dismissed, and thus its claim before this Court is barred by the former proceedings. Quincy argues that its claim is not barred by res judicata because: (1) the causes of action are not identical; (2) the Bankruptcy Court lacked jurisdiction of the case at bar; (3) the first action was begun before the second action accrued; and (4) statements made by the Bankruptcy Court are not determinative in this case.

ANALYSIS

Quincy is correct when it claims that its rights under the lease, as modified by the letter agreement, are separate from the bankruptcy claim. The original bankruptcy claim is based on Parisian's breach of the mortgage in 1992, which threatened Quincy's fee interest in the property. The instant claim is based on a breach of the lease and letter agreement. Parisian assumed the lease, as modified by the letter agreement, pursuant to 11 U.S.C. §§ 365. Once that occurred, Parisian was obligated to cure any or all defaults and perform all of its obligations under that lease and letter agreement. Parisian allegedly breached that agreement in 1994, when the receiver started collecting the rents, and Parisian did not make the additional payments to Quincy under the letter agreement. The claims therefore are distinct for res judicata purposes. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993).

Quincy, however, seeks the same damages in both the bankruptcy claim and in its claim before this Court. The issue, therefore, is whether the Bankruptcy Court's determination against Quincy on all triable issues precludes Quincy from attempting to prove any damage in this case. The Bankruptcy Court's decision precludes Quincy from raisin these issues under the doctrine of collateral estoppel if there is (1) an identity of the parties, (2) an identity of the issues, (3) the issues were actually litigated, and (4) the determination of the issues was essential to the final judgment. *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987). The parties are identical. The other elements are also present.

The damages issues in this action were before the Bankruptcy Court. Quincy sought in both actions to recover the $600,000 it paid to Bank One. Quincy specifically asserted in both the bankruptcy claim and in its

claim in this action that it paid the money to Bank One to avoid lost rents. Parisian asserted in its objection to the amended claim that it had satisfied all of its obligations to Quincy. Parisian specifically stated that it paid Quincy all sums due and owing under the lease and letter agreement. Thus, the question of whether Quincy suffered lost rents under the lease and the letter agreement was before the Bankruptcy Court.

Moreover, the Bankruptcy Court needed to determine Quincy's rights in this action in order to liquidate Quincy's bankruptcy claim. Quincy filed its amended proof of claim to liquidate the amount to which it was entitled under that claim. To liquidate the claim, the Bankruptcy Court would be required to estimate the amount that Quincy could recover from sources outside the bankruptcy to satisfy that claim. 11 U.S.C. §§ 502 (c) (1). Sums recoverable elsewhere would reduce the bankruptcy claim and leave more bankruptcy assets available to satisfy other creditors. Thus, the Bankruptcy Court needed to estimate the amount that Quincy could recover in this case, outside of bankruptcy, in order to liquidate Quincy's bankruptcy claim. This cause of action was in essence, therefore, before the Bankruptcy Court.

Further, the issues were actually litigated for collateral estoppel purposes. Quincy attempted to avoid litigation of the issues before the Bankruptcy Court by seeking withdrawal of its amended bankruptcy claim. Quincy, however, was not free to withdraw the claim because Parisian had objected to the amended claim.

Once a party in interest objects, a creditor can only withdraw its claim with the approval of the Bankruptcy Court. *See* Bankruptcy Rule 3006. Parisian objected to withdrawal because it had spent years in the Bankruptcy Court attempting to resolve this claim; it had the matter

close to resolution, and it did not want to start over in a new forum.

Quincy's solution to Parisian's objections was a withdrawal with prejudice. Quincy urged the Bankruptcy Court to allow withdrawal of the claim with prejudice because such a result would be the same resolution as if the claim had been litigated and found in Parisian's favor. The Bankruptcy Court took Quincy at its word, finding all triable issues against Quincy as if the matter had been fully litigated. The Bankruptcy Court had the authority to place "such terms and conditions as the court deems proper" in the order. Bankruptcy Rule 3006.

A consent judgment, such as Quincy's consent to the dismissal of its bankruptcy claim with prejudice, is considered a litigation of the issues for collateral estoppel purposes if the parties could reasonably have foreseen the conclusive effect of their actions. *Klingman*, 831 F.2d at 1296. Quincy not only could have reasonably foreseen that the Bankruptcy Court's order would have conclusive effect; it asked for it. All triable issues, including all damage issues, were fully litigated before the Bankruptcy Court for collateral estoppel purposes.

Finally, Quincy's damage claims were essential to the final judgment in the bankruptcy proceeding. The measure of damages was an element of its claim. Parisian disputed whether it was liable for any damages. Parisian particularly denied Quincy's claim for lost rents, alleging that it had paid Quincy all sums due and owing under the lease and letter agreement. The Bankruptcy Court therefore effectively decided that Parisian had paid all sums due and owing to Quincy under the lease and letter agreement. The Bankruptcy Court's decision has preclusive effect. Quincy cannot prove either a breach of the lease and letter agreement or any damages resulting from Parisian's action. Quincy therefore fails to state a claim.

THEREFORE, Defendant Parisian's Motion to Dismiss (d/e 11) is ALLOWED. This case is closed.

ENTER: October 30, 2000.

FOR THE COURT:

s/Jeanne E. Scott
JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In the Matter of

P.A. Bergner & Co. Holding Company, et al.
Reorganized Debtor.

Case Nos. 91-05501 to
91-05516 and 93-20736
Jointly Administered
Chapter 11 Post-Confirmation

ORDER GRANTING MOTION OF DON M. CASTO ORGANIZATION/QUINCY MALL, INC. TO WITHDRAW CLAIM NOS. 3342-3345 AS AMENDED ON DECEMBER 22, 1999, WITH PREJUDICE AND ON THE MERITS

On March 19, 1992, Don M. Casto Organization/ Quincy Mall, Inc. timely filed Claim Nos. 3342-3345 in the above-captioned case(s). The Reorganized Debtor timely objected to the four claims. The four claims were subsequently amended by Don M. Casto Organization/ Quincy Mall, Inc. on December 22, 1999. On January 12, 2000, the Reorganized Debtor objected to the amended claims. On March 2, 2000, Don M. Casto Organization/ Quincy Mall, Inc. filed a Motion to Withdraw Claims Nos. 3342-3345 as Amended on December 22, 1999. The court held a status conference on the motion on March 6, 2000. On March 10, 2000, the Reorganized Debtor filed a brief in opposition to Don M. Casto Organization/ Quincy Mall, Inc.'s motion to withdraw the claims as amended on December 19, 1999. Don M. Casto Organization/Quincy

Mall, Inc. filed a reply on March 15, 2000. Oral argument took place on March 17, 2000. Don M. Casto Organization/Quincy Mall, Inc. was principally represented by Scott Andrew Farrow and assisted by Randall D. Crocker both of von Briesen, Purtell & Roper, s.c. The Reorganized Debtor was represented by Jerome R. Kerkman of Maier McIlnay & Kerkman, Ltd.

For the reasons set out in the court's oral decision which was read into the record on this date and can be found in the court reporter's notes,

IT IS HEREBY ORDERED that the Motion of Don M. Casto Organization/Quincy Mall, Inc. to Withdraw Claim Nos. 3342-3345 as Amended on December 22, 1999, is granted with prejudice and on the merits. The objection of the Reorganized Debtor to each of the four claims as amended on December 22, 1999, is sustained as though there had been full adjudication, regardless of the theory of recovery, of each and every fact and issue, as well as all law, included in, referenced in, and/or related to each of the four claims as amended on December 22, 1999. All damages, sums, and rights, regardless of the theory of recovery, whether valued, unvalued, liquidated, unliquidated, contingent or non-contingent, which were required in, referenced in, and/or related to each of the four claims as amended on December 22, 1999, are denied with prejudice and on the merits. This shall include, without limitation of any kind, the "(a) $600,000 cash payment to Bank One by Quincy Mall; plus (b) Loss of specific rights in its fee valued to be at least $123,444." (Quincy Amendment ¶ 7.) Judgment shall be drafted by the Clerk and entered accordingly.

Dated at Milwaukee, Wisconsin, March 17, 2000.

s/Russell A. Eisenberg
United States Bankruptcy Judge